IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 2374 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

DINESH SOMCHAND SHAH

Versus

DILIP RAMCHAND CHANDWANI

Appearance:

MR NS SHETH for Petitioner

MR JAYESH A DAVE for Respondent No. 1

Mr K G Sheth, APP for Respondent No. 2

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 05/10/2000

ORAL JUDGEMENT

The present petition has been filed under Section 482 of the Criminal Procedure Code, 1973 for quashing a

complaint filed by the present respondent no.1 before the learned Metropolitan Magistrate at Ahmedabad being Criminal Case No.1569/98 for offence punishable under Section 138 of the Negotiable Instruments Act, 1881. (for short, 'the Act'). The facts may be briefly stated as under:

2. As per the case of the contesting respondent no.1, an amount of Rs.60,000/- was due to him by the present petitioner and, therefore, the present petitioner had issued a cheque in a sum of Rs. 60,000/- on 2.3.1998. That the said cheque was presented to the bank on 12.8.1998 but the cheque was not honoured and therefore, the contesting respondent received the cheque back from the bank. That thereafter, the respondent issued notice on 25.8.1998. Despite the issue of notice, payment was not made and therefore, a complaint was filed on 5.10.1998 against the petitioner by the first respondent for offence punishable under Section 138 of the Act. The petitioner appeared before the trial court and submitted an application for dropping the proceedings against him. The trial court heard the parties and dismissed the said application by order dated 11.2.2000.

3. The petitioner has preferred this petition for quashing the said complaint. It has been mainly contended here that no notice has been served upon the petitioner as per the requirement of the Act and, therefore, the complaint is not maintainable and the same may be quashed.

4. Notice was issued at the first instance and thereafter Rule was issued. I have heard the learned Advocates for the parties and have perused the papers. The facts are not much in dispute. Against the dues of Rs.60,000/- a cheque was issued on 2.3..1998 by the petitioner in favor of the first respondent. It was presented in the bank on 12.8.1998. Then on the same day, it was not honoured and, therefore, the contesting respondent received the said cheque back from the bank. Thereafter the first respondent issued notice on 25.8.1998 and since the payments were not made, a complaint was filed on 5.10.1998. On this aspect of the case, learned Advocate for the petitioner has submitted that there is no averment about the service of notice and the date of service of notice in the complaint. On this aspect, the learned Advocate for the respondent makes a statement that notice was not received back by the contesting respondent served or unserved at the time when the complaint was filed and, therefore, it was not possible for the contesting respondent to mention in the

complaint if the notice was served or not. He also submits that after the complaint was filed, some correspondence was entered into with the postal authorities and thereafter, the contesting respondent received the aforesaid envelope with endorsement that "addressee was not found" and the second endorsement was "left". It is also submitted by him that this endorsement were made on 27.8.98, 28.8.98 and 29.8.98, meaning thereby that the aforesaid envelope containing the notice issued by the contesting respondent to the petitioner was brought at the address of the addressee on 27.8.98, 28.8.98 and 29.8.98, but the addressee was not found on two occasions and on third occasion, the postman found that the addressee had left the place of residence. Therefore, the notice could not be served. It would be clear from the bare reading of the provision contained in the aforesaid Act that there is a requirement of issue of notice. The proviso (b) of section 138 of the Act makes it clear that as per this requirement, a notice is required to be given by the respondent to the petitioner and it does not say that the notice has to be served upon the petitioner as the words are as follows:

> "138 (b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;"

Provided that nothing contained in this section shall apply unless the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid. Therefore, there is a mention about giving of cheque. Ordinarily the provisions elsewhere are found that the notices are required to be served. Here the words are different and that has to be borne in mind.

5. On this aspect of the case, reliance was placed on a decision in the case of Satish Jayantilal Shah v. Pankaj Mashruwala 1996 (2) GLR 751. There it has been observed as under:

> "As regards practice and procedure for service of notice through post and if the addressee endeavours to manage to see that the notice is

> returned with postal marks "not available in the house", "house locked", shop closed", the Apex Court in recent decision in the case of the State of Madhya Pradesh v. Hiralal & Ors. JT 1996 (1) SC 669 has held it to be a valid service on respondent - addressee. In light of this decision, the contention does not hold good as on facts also the prosecution case is on much sounder footing and the notice shall be deemed to have been served and much significance cannot be attributed to difference in signature".

In another decision of the Madras High Court in the case of L Sonkadhir v. P Thiyagarajan 1998 Cri.L.J.3903 it has been laid down that the question as to whether there is an actual receipt, through physical receipt or deemed receipt is a question of fact and that it can be dealt with during the course of trial and not at a revisional stage. This is the stage of quashing and, therefore, when the question of fact arises, this court will not enter into that question of fact. At the same time, the fact remains that the envelope was received back by the first respondent. It is for the contesting respondent to show to the trial court as to how the said endorsements were required to be interpreted. If the petitioner has not changed the address and the address is correct, then in that event, appropriate arguments can be advanced on behalf of the respondent as has been discussed in the earlier decision of this court referred to hereinabove. Hon'ble Supreme Court has also laid down in K Bhaskaran v. Sankaran Vadhyan Balan & anr. (1999 AIR SCW 3809) as to the requirement of section 138 of the said Act. There also the notice sent by post was returned by the accused as unclaimed. The Supreme Court has ruled that the period of 15 days commences from such date and the notice is presumed to have been served. The contesting respondent will be in a position to deal with the said issue before the trial court.

6. It has been submitted by the learned Advocate for the petitioner that the said envelope was not submitted before the trial court even when the application was submitted by the petitioner for his discharge from the prosecution. If such a document was not produced at the relevant point of time, the contesting respondent may not be totally barred from producing the same at the time when evidence begins before the trial court. Once the document is produced before the trial court, it would be for the trial court to appreciate the same as a piece of evidence. Similar view was adopted by this court in Criminal Revision Application No.143/97 dated 16.6.2000

(coram : A L Dave, J.]. Any way, the question of service of notice is a question of fact and it can be dealt with appropriately by the trial court on appreciation of evidence which may be produced before it for consideration.

7. In the aforesaid view of the matter, it cannot be said that no notice was served and the requirement of sections 138 and 142 of the said Act have not been complied with. In view of the above, the compliant cannot be quashed at this stage and the respondent must get an opportunity to lead evidence before the trial court and to prove his case. Once the evidence is produced, it will be for the trial court to appreciate the same. There is no merit in this petition and the same is required to be dismissed.

This petition is accordingly dismissed. Rule discharged.

05.10.2000 [D P Buch, J.]

msp